Nos. 92-1066 & 92-1157

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN EDWARDS and RICHARD P. IEYOUB,

Petitioners,

—v.—

SOJOURNER T., *et al.*,

Respondents.

HARRY CONNICK,

Petitioner,

—v.—

SOJOURNER T., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

WILLIAM E. RITTENBERG
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
ELLEN K. GOETZ
LENORA M. LAPIDUS
The Center for Reproductive Law & Policy
120 Wall Street
New York, NY 10005
(212) 514-5534

Attorneys for Respondents

QUESTION PRESENTED

Whether Act 26 of the 1991 Louisiana Legislature, banning virtually all abortions and many commonly used methods of birth control, is unconstitutional on its face under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)?

PARTIES TO THE PROCEEDING

Plaintiffs-Appellees below and Respondents herein are Sojourner T., Jane and Ida B., on behalf of themselves and all other similarly situated; James DeGueurce, M.D., Calvin Jackson, M.D., and Pamela Branning, M.D., on behalf of themselves and all others similarly situated, and their patients; Hope Medical Group for Women; Delta Women's Clinic West; Causeway Medical Suite; Emilia Bellone, M.S.W., on behalf of herself and her clients; Reverend Kathleen Korb and Rabbi Michael Matuson, on behalf of themselves and their congregants; and Dr. Ifeanyi Charles Okpalobi.*

The Defendants-Appellants below and Petitioners in the case at bar are Edwin Edwards, as Governor of Louisiana; Richard P. Ieyoub, as Attorney General of Louisiana; and Harry Connick, as District Attorney for the Parish of Orleans.

---

* Dr. Okpalobi is separately represented by Sidney Bach in this Court, and has filed a separate Brief in Opposition to Certiorari.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ABORTION AND CONTRACEPTION CASES 8

II. CONTRARY TO PETITIONERS' ARGUMENT, FACIAL CHALLENGES ARE ROUTINELY PERMITTED OUTSIDE THE CONTEXT OF THE FIRST AMENDMENT 14

CONCLUSION 21

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: **Page**

Aptheker v. Secretary of State,
378 U.S. 500 (1964) . . . . . *passim*

Barnard v. Thorstenn, 489 U.S. 546 (1989) 15

Bellotti v. Baird, 443 U.S. 622 (1979) 13

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 9

Chapman v. United States, 111 S. Ct. 1919 (1991) . . 19

City of Akron v. Akron Ctr. for Reproductive Health,
462 U.S. 416 (1983) 13, 14

Cleveland Bd. of Educ. v. Lafleur,
414 U.S. 632 (1974) 18

Colautti v. Franklin, 439 U.S. 379 (1979) 13

Dunn v. Blumstein, 405 U.S. 330 (1972) 16, 18

Edwards v. Aguillard, 482 U.S. 578 (1987) 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9

Griswold v. Connecticut,
381 U.S. 479 (1965) 9, 12, 13

Guam Soc'y of Obstetricians & Gynecologists v. Ada,
962 F.2d 1366 (9th Cir.), *cert. denied*,
113 S. Ct. 633 (1992) 6

Guste v. Weeks, 429 U.S. 1056 (1977) 8

Harper v. Virginia Bd. of Education,
383 U.S. 663 (1966) 15

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 13

Hynes v. Mayor of Oradell, 425 U.S. 610 (1975) . . . 19

In re Initiative Petition No. 349, 838 P.2d
1 (Okla. 1992), *cert. denied*, 61 U.S.L.W. 3480
(U.S. Jan. 11, 1993) (No. 92-784) 6

Kraft Gen. Foods v. Iowa Dep't of Revenue,
112 S. Ct. 2365 (1992) 15, 20

Mitchell v. Tillman, 469 So. 2d 363
(La. Ct. App. 1985) 5

Moore v. City of East Cleveland,
431 U.S. 494 (1976) 15, 16

NAACP v. Alabama, 377 U.S. 288 (1964) 13, 17

Ohio v. Akron Ctr. for Reproductive Health,
110 S. Ct. 2972 (1990) 9, 12

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 15, 15-16

Planned Parenthood v. Casey, 978 F.2d 74
(3d Cir. 1992) 11

Planned Parenthood v. Casey, 112 S. Ct. 2791
(1992) . . . . . *passim*

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 13

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Rust v. Sullivan, 111 S. Ct. 1759 (1991) 10

Scales v. United States, 367 U.S. 203 (1961) 19

Shapiro v. Thompson, 394 U.S. 618 (1969) 16

Stanley v. Illinois, 405 U.S. 645 (1972) 15

Webster v. Reproductive Health Servs.,
492 U.S. 490 (1989) 1, 10, 12

Weeks v. Connick,
733 F. Supp. 1036 (E.D. La. 1990) 1

United States v. Monsanto, 491 U.S. 600 (1989)) . . . 19

United States v. Reese, 92 U.S. 214 (1876) 19

United States v. Salerno, 481 U.S. 739 (1987) . . . *passim*

United States Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 15

United States Dep't of Agric. v. Murry,
413 U.S. 508 (1973) 15

Virginia v. American Booksellers Ass'n,
484 U.S. 383 (1988) 5, 19

Zablocki v. Redhail, 434 U.S. 374 (1978) 15, 19

Statutes:

Act 26 of the 1991 Louisiana Legislature . . . . . *passim*

La. Civ. Code Ann. art. 26 (West Supp. 1992) 3

La. Rev. Stat. Ann. § 9:121 (West 1991) 3

La. Rev. Stat. Ann. § 37:1285(A)(8)(a) (West 1988) . . 11

La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1992) . 3

La. Rev. Stat. Ann. § 40:1299.35.1(1)
(West Supp. 1992) 3

9 Guam Code Ann. § 31.20 4

Texas Penal Code Art. 1191 4

Utah Code Ann. § 76-7-301(1) (Supp. 1992) 4

Miscellaneous:

Sup. Ct. R. 10.1(a) 6

Sup. Ct. R. 10(c) 6

Fec. R. Civ. P. 60(b)(5) 1

Brief of 167 Distinguished Scientists
and Physicians, including 11 Nobel
Laureates, as *Amici Curiae*, *Webster*
v. Reproductive Health Servs.,
492 U.S. 490 (1989) (No. 88-605) 8

Petition for Certiorari in *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, No. 92-104 7

Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984) 17

Respondents Sojourner T., et al., oppose the Petitions for a Writ of Certiorari filed on December 18, 1992, and December 21, 1992, by the Governor and Attorney General of Louisiana, and the District Attorney of Orleans Parish, respectively. The Petitions seek review of a decision of the United States Court of Appeals for the Fifth Circuit holding Act 26 of the 1991 Louisiana Legislature, which would ban virtually all abortions in the State, unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

COUNTERSTATEMENT OF THE CASE

Beginning immediately after this Court's decision in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), Louisiana began to take steps "to enact abortion legislation reminiscent of the dark ages." *Id.* at 521 (Opinion of Rehnquist, C.J.) (plurality opinion). Within one week of this Court's decision in *Webster*, petitioner Connick filed a motion pursuant to Fed. R. Civ. P. 60(b)(5) to lift an injunction against Louisiana's pre-*Roe* criminal statute banning abortion. *See Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990) (three-judge court) (pre-*Roe* law repealed by implication). Then, in its 1990 session, the Louisiana Legislature passed a bill banning virtually all abortions in the state. The bill was vetoed by then Governor Buddy Roemer.

Finally, on June 18, 1991, over the veto of Governor Roemer, the Louisiana Legislature enacted House Bill No. 112 as Act 26 ("the Act"), prohibiting virtually all abortions in Louisiana under penalty of one to ten years imprisonment and a fine of $10,000 to $100,000. *See* *A-

25-26.[2] Only abortions performed under the following narrow circumstances are "not . . . unlawful":

(1) "to preserve the life or health of the unborn child or to remove a dead unborn child"; or

(2) "for the express purpose of saving the life of the mother."

A-20. In addition, "within thirteen weeks of conception," A-21, an abortion may be performed:

(3) where the pregnancy is the "result of rape as defined in [La. Rev. Stat. Ann.] §§ 14:42, 14:42.1, or 14:43," and the rape victim obtains "a physical examination and/or treatment from a physician other than the physician who is to terminate the pregnancy within five days of the rape to determine whether she was pregnant prior to the rape," or "within five days of the removal of [an] incapacity" that prevents such an examination, and the "rape victim reports the rape to law enforcement officials"; or

(4) where the pregnancy "is the result of incest as defined in [La. Rev. Stat. Ann. §] 14:78, provided the crime is reported to law enforcement officials."

A-20-21. Abortion is defined as:

---

[2] Citations to the petition by Governor Edwards and Attorney General Ieyoub are in the form "Pet. at __" and citations to its appendix are in the form "A-__"; citations to the petition of District Attorney Connick are in the form "*Pet. at __" and citations to its appendix are in the form "*A-__." Where possible, citations are given to the appendix to the former. Citations to the appendix to this Brief in Opposition are in the form "__a."

> [T]he performance of any of the following acts, with the specific intent of terminating a pregnancy:
>
> (a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or
>
> (b) Using any instrument or external force whatsoever on a female.

A-20. The Act, however, does not define "pregnancy." Instead, the operative term throughout the legislation -- indeed, throughout Louisiana law[3] -- is "conception." Conception is defined as "the contact of spermatozoan with the ovum," A-22; "unborn child" is defined as "the unborn

---

[3] In 1981, the Louisiana legislature expressed its intent that the laws of Louisiana should protect fetal life from the moment of conception:

> The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.

La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1992). A companion section, La. Rev. Stat. Ann. § 40:1299.35.1(1) (West Supp. 1992), most recently amended in 1981, specifically defines abortion as "the deliberate termination of a human pregnancy after fertilization of a female ovum . . . ." Other Louisiana statutes, not related directly to abortion, also assign rights beginning at conception or fertilization. For example, Louisiana's law regulating the legal status and uses of human embryos defines a human embryo as "an in vitro fertilized human ovum . . . composed of one or more living cells . . . ." La. Rev. Stat. Ann. § 9:121 (West 1991). *See also* La. Civ. Code Ann. art. 26 (West Supp. 1992) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception.")

offspring of human beings from the moment of *conception* until birth," *id.* (emphasis added); and abortions in cases of rape and incest must be performed "within thirteen weeks of *conception*," A-21 (emphasis added). Because, unlike much other restrictive abortion legislation,[4] the Act penalizes termination of pregnancy that occurs after "conception" but before implantation of the fertilized ovum, the Act prohibits many commonly used methods of birth control, including the intrauterine device, the morning-after pill, and the low-dose pill, all of which sometimes act to prevent implantation of a fertilized ovum.[5]

---

[4] The abortion ban statutes enacted recently in Utah and Guam both exclude pre-implantation terminations of "pregnancy" from their scope. The Guam statute defines abortion as "the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus." 9 Guam Code Ann. § 31.20. Similarly, Utah's statute defines abortion as "the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum . . . " Utah Code Ann. § 76-7-301(1) (Supp. 1992). Even the Texas statute struck down by this Court in *Roe* effectively excluded pre-implantation terminations of pregnancy: "By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused." *Roe v. Wade*, 410 U.S. 113, 117 n.1 (1973) (quoting Texas Penal Code Art. 1191).

[5] The Act's legislative history also supports its application to certain types of birth control. For example, in his June 14, 1991, veto statement, Governor Roemer wrote:

> As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the

(continued...)

This case was filed on June 18, 1991. On June 20, 1991, Judge Duplantier of the United States District Court for the Eastern District of Louisiana directed the parties to file cross-motions for judgment on the pleadings, thereby eliminating any opportunity for meaningful factual development in the case. On August 7, 1991, two days after the motions were filed, the district court held the Act unconstitutional on its face while simultaneously bemoaning the continuing validity of the central holding of *Roe v. Wade*. A-14-16. The next day, petitioners filed their notice of appeal.

---

[5](...continued)

> Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Appendix A at 1a (*Statement of Governor Buddy Roemer Regarding House Bill No. 112)*, at 1. One amendment offered by the Governor:

> would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device.

Id. at 2. The Legislature's rejection of this amendment supports a finding that the Legislature intended to reach the insertion of intrauterine devices and, indeed, any other type of birth control that might operate to prevent implantation of a fertilized egg. The opinion of Louisiana Attorney General Guste to the contrary, *see* A-24-30, is, under Louisiana law, "at most persuasive." *Mitchell v. Tillman*, 469 So. 2d 363, 365 n.3 (La. Ct. App. 1985) (citations omitted); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395 (1988). Indeed, because it is a self-serving opinion issued in the midst of this litigation, even its persuasive value is extremely limited.

The Court of Appeals unanimously affirmed the decision of the district court on September 22, 1992, holding squarely that this Court's decision in *Casey* invalidated the Act. A-5. Judge Garza concurred specially, lamenting this Court's refusal in *Casey* to overturn *Roe* completely, while properly recognizing that he was bound by *Casey*. A-8-10.

REASONS FOR DENYING THE WRIT

Petitioners make no claim that the decision of the Court of Appeals is "in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort." Sup. Ct. R. 10.1(a). Indeed, the decision of the court below is in harmony with each of the two courts -- one federal court of appeals and one state supreme court -- that have addressed the constitutionality of a ban on abortion following this Court's decision in *Casey*. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992); *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992), *cert. denied*, 61 U.S.L.W. 3480 (U.S. Jan. 11, 1993) (No. 92-784).

Instead, the only Rule 10 factor petitioners appear to invoke is that the court below "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c). They argue that the Act must be upheld as facially constitutional under *United States v. Salerno*, 481 U.S. 739 (1987), because it may have "some" constitutional applications, particularly as to abortions performed for race or sex selection or to "harvest" fetal parts, as to post-viability abortions, and as to abortions

performed by non-physicians. *See* Pet. at 11; *Pet. at 8.[6] Thus, petitioners claim that the decision of the court below conflicts with *Salerno* and related cases, despite this Court's most recent holding in *Casey* that a ban on pre-viability abortions is unconstitutional regardless of whether the ban contains exceptions. 112 S. Ct. at 2804, 2821.

Contrary to petitioners' contention, the decision below in no way conflicts with this Court's decisions; rather, it is required by clear, controlling precedent of this Court. Moreover, petitioners have misconstrued and misrepresented the holdings of *Salerno* and related cases in an attempt to eviscerate all constitutional protection for the constitutional right to choose abortion. Both within its abortion jurisprudence and in other areas of constitutional law, this Court has not hesitated to invalidate statutes on their face when it is clear that fundamental constitutional rights will be severely burdened if the statutes are allowed to go into effect.

At bottom, then, the petitions in this case are no more than a request that this Court overrule its recent decision in *Casey*. *See* Pet. at 11-29. Petitioners advance no persuasive reason for this Court to reconsider its decision in

---

[6] These arguments are virtually identical to those made by the Governor of Guam in his unsuccessful petition for certiorari to review Guam's ban on abortion. *See* Petition for Certiorari in *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, No. 92-104, at 8-15.

Casey to reaffirm *Roe*'s central holding,[7] and the petition must therefore be denied.

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ABORTION AND CONTRACEPTION CASES.

Petitioners have failed to show that the decision below conflicts with any of this Court's prior abortion or contraception cases. In fact, the outcome in the case below was mandated by this Court's decision last Term in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992), in which this Court clearly and unequivocally "retained and once again reaffirmed" the "essential holding of *Roe v. Wade*," 410 U.S. 113 (1973); *see also id.* at 2821 ("[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from

---

[7] Petitioners argue, *inter alia*, that this Court's holding in *Casey* that *stare decisis* supports reaffirmation of *Roe* is incorrect, and that *Roe* incorrectly described the state interest in prohibiting abortion as an interest in "potential life." Pet. at 12-17. Each of these arguments were carefully considered and rejected in *Casey*. 112 S. Ct. at 2808-16, 2817; *id.* at 2839 (Stevens, J., concurring in part and dissenting in part). In addition, Petitioners argue that "scientific knowledge available since *Roe v. Wade*" justifies the Act. Pet. at 17. However, developments in scientific knowledge since *Roe* have not removed the underpinnings of this Court's holding in *Roe* that "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," 410 U.S. at 159, on when human life begins. *See* Brief of 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, as *Amici Curiae* at 3-7, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605). Petitioners' argument that Louisiana's civil law tradition uniquely gives Louisiana a compelling interest in fetal life from the moment of conception was presented to this Court and implicitly rejected in *Guste v. Weeks*, 429 U.S. 1056 (1977).

making the ultimate decision to terminate her pregnancy before viability") (Opinion of O'Connor, Kennedy, and Souter, JJ.). That the Act is unconstitutional under *Roe*, as reaffirmed in *Casey*, is beyond doubt.[8]

Although this Court has relied on *Salerno* in several recent abortion cases, each has involved speculative challenges to statutory provisions in the absence of factual support. These cases have held only that facial challenges cannot prevail when based on an implausible statutory interpretation or "worst-case analysis that may never occur." *See, e.g., Ohio v. Akron Ctr. for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) (*Akron II*).[9] Such a

---

[8] Because the court below decided this case on other grounds, it did not reach the question of whether the Act violated the strictures of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny. *See* A-7 n.5; *see also* A-5-6 (despite general rule favoring decision on statutory rather than constitutional grounds, case would be decided under "clear holding of *Casey*."). Since *Griswold*, however, it has been a settled point of law that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . . . [R]egulations imposing a burden on [this right] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977); *see also Griswold*, 381 U.S. at 497 (Goldberg, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Casey*, this Court reiterated that it had "no doubt as to the correctness of those decisions." 112 S. Ct. at 2807. Because it imposes a criminal ban on contraceptives that work after fertilization, but before implantation, the Act also clearly fails to pass constitutional muster under these cases.

[9] In *Akron II*, this Court rejected an argument that a judicial bypass procedure for a parental notice statute was not sufficiently expeditious. By interpreting the number of "days" required for the bypass to mean "business days," and reasoning that the bypass procedure could occur at a time of the year when it would encompass three Saturdays, three

(continued...)

test -- which only bars plaintiffs from bringing remote or speculative claims -- is not equivalent to Petitioners' proposed test, which would require plaintiffs to demonstrate that there is *no* constitutional application of a challenged statute. But no implausible or speculative interpretation of the Act is required to see that the Act is in direct contravention of *Roe* and *Casey*.[10]

---

[9](...continued)
Sundays, and two legal holidays, the lower courts had calculated that the procedure could take up to 22 calendar days. *Id.* at 2980. This Court held, however, that "the mere possibility that the procedure may require up to twenty-two days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 2981. *See also Webster*, 492 U.S. at 523 (O'Connor, J., concurring) (rejecting challenge to Missouri's ban on the use of public facilities in the performance of abortions, which was based on the contention that the statute could be applied "against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land"). Likewise, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), does not establish that the *Salerno* facial challenge test applies to all abortion regulations. There, the facial challenge to restrictions on abortion counseling in federally funded programs the government had violated no constitutional right since "the Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Id.* at 1776. Here, the Act unquestionably violates the constitutional rights of women established in *Roe* and *Casey*.

[10] The Act prohibits virtually all abortions, both before and after viability. Indeed, even as to post-viability procedures, the Act is unconstitutionally restrictive because it permits only those procedures performed "for the express purpose of saving the life of the mother," A-20, and contains no exception whatsoever for the health of the woman. Both *Roe* itself, 410 U.S. at 164-65, and *Casey* require post-viability restrictions to "contain[] exceptions for pregnancies which endanger a woman's life *or health*." *Casey*, 112 S. Ct. at 2804 (emphasis added). Further, the Act conflicts with an existing Louisiana statute authorizing discipline of physicians for "[p]erforming, or assisting in the performance of, or procuring or abetting in procuring an (continued...)

Moreover, *Casey* itself rejects the application of petitioners' version of *Salerno* to abortion cases. In striking down Pennsylvania's husband notice requirement on its face,[11] the *Casey* Court wrote:

> Respondents attempt to avoid the conclusion that § 3209 [the husband notification requirement] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . Respondents argue that . . . the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. *We disagree with respondents' basic method of analysis.*
>
> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on

---

[10](...continued)
abortion or termination of pregnancy during the third trimester of pregnancy or after viability of the fetus, unless the physician determines that such abortion or termination of pregnancy is necessary, in his best medical judgment, in order to save the life *or health* of the pregnant woman and/or of the fetus (unborn child)." La. Rev. Stat. Ann. § 37:1285(A)(8)(a) (emphasis added) (West 1988).

[11] While the Court upheld a number of other challenged provisions of the Pennsylvania Act, it did so based on the record before it. *See, e.g.*, 112 S. Ct. at 2826; *id.* at 2824; *id.* at 2833; *see also id.* at 2880 (Scalia, J., dissenting). The case has been remanded for further proceedings and plaintiffs have moved to reopen the record so that the district court may make the further factual determinations necessitated under the new undue burden standard established by this Court. *Planned Parenthood v. Casey*, 978 F.2d 74, 78 (3d Cir. 1992).

> those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

112 S. Ct. at 2829 (citation omitted) (emphasis added). The critical inquiry, therefore, is whether "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[12] *Id.* at 2830. It is clear beyond peradventure that the Act will prohibit not only a "large fraction" of abortions, but virtually all of them.

The position urged by Petitioners runs counter not only to the test adopted by a majority of Justices in *Casey*, but also to this Court's decisions in a number of facial challenges to abortion statutes both before and after *Webster*, when the shift away from the strict scrutiny standard of review for abortion cases first began.[13] *See*,

---

[12] By contrast, the dissenting Justices would have followed the approach urged by Petitioners herein and required plaintiffs in abortion cases to "show that no set of circumstances exists under which the [provision] would be valid." *See id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Akron II*, 110 S. Ct. at 2980-81); *see also id.* at 2870 n.2 (complaining that the joint opinion "appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision."); *id.* at 2854 (Blackmun, J., concurring in part and dissenting in part) (the Chief Justice's test would be an "insurmountable requirement for facial challenges").

[13] Petitioners' analysis also conflicts with this Court's decisions concerning state regulation of contraceptives. For example, in *Griswold*, recognizing that a ban on the use of contraceptives would "achieve its goals" by having a "maximum destructive impact upon [the marital] relationship," *Griswold*, 381 U.S. at 485, the Court invalidated

(continued...)

e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). For example, in *Hodgson*, this Court struck down on its face the statutory provision requiring a minor to notify both parents before obtaining an abortion without allowing her the option of using a judicial bypass procedure. In so doing, the Court focused on the families of those minors who would not have notified both parents in the absence of the statute -- i.e., the "group for whom the law is a restriction." *Casey*, 112 S. Ct. at 2829. In particular, the Court examined the deleterious effects of this requirement on those families in which "the parent notified by the child would not notify the other parent." *Hodgson*, 110 S. Ct. at 2945; *see also id.* at 2966 (Kennedy, J., concurring in part and dissenting in part) (majority reached its result by finding that "law is unnecessary when notice produces favorable results . . . and irrational in all of the instances when it produces unfavorable results"). Thus, the Court invalidated the provision even though there was no proof that the burdens on families would be severe in *every* case. By contrast, the dissenting Justices would have upheld the two-parent notice requirement, even though "[l]ike all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies . . . ." *Id.* at 2969 (Kennedy, J., dissenting); *see also id.* at 2950 (O'Connor, J., concurring) (invalidating two-parent notice statute because of "its broad sweep and its failure to serve the purposes asserted by the State in too many cases").

---

[13](...continued)
the ban because it "swe[pt] unnecessarily broadly and . . . invade[d] the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *see also id.* at 498 (Goldberg, J., concurring).

Likewise, in *Akron I*, in invalidating a second trimester hospitalization requirement, the Court relied heavily on the fact that early second trimester abortions could be safely performed in an outpatient clinic. 462 U.S. at 437. Akron had argued, much like petitioners do now, that these examples of unconstitutional applications should not invalidate the requirement. *Id.* at 438. Nonetheless, the Court found that by preventing the performance of some abortions in an appropriate non-hospital setting, Akron "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.*

Petitioners' request amounts to a plea that this Court undertake a radical rereading of plaintiffs' burden in facial constitutional challenges. If this Court adopts Petitioners' test, it must overrule each of the abortion cases noted above. An "as-applied" determination must then be made on a case-by-case basis, as those few doctors who are not chilled by the criminal and civil sanctions that may be imposed on them are charged under these laws.[14] *Casey* does not impose this regime on the right to choose abortion.

II. CONTRARY TO PETITIONERS' ARGUMENT, FACIAL CHALLENGES ARE ROUTINELY PERMITTED OUTSIDE THE CONTEXT OF THE FIRST AMENDMENT.

This Court's contraception and abortion cases are not exceptional; indeed, this Court has permitted facial challenges in a wide range of cases outside the First

---

[14] Thus, Petitioner Connick explicitly advocates that *Casey* "be read" to require only that states allow the affirmative defense of "non-viability" to a general prohibition of abortion. *Pet. at 10-14. This is not a "reading" of *Casey*, but an overruling of it.

Amendment context. Under Petitioners' proposed standard, if a statute violates the Constitution in 99 out of 100 applications, the one constitutional application would force a court to ignore the 99 unconstitutional applications and uphold the statute. This, of course, cannot be, and is not, the law.[15]

The Court has not hesitated to strike down a statute on its face even when the statute could be applied constitutionally in some circumstances. *See, e.g.*, *Kraft Gen. Foods v. Iowa Dep't of Revenue*, 112 S. Ct. 2365 (1992); *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1976); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Particularly where fundamental rights are burdened, the Court has regularly invalidated laws that operate unconstitutionally as applied to some people but not others. *See Zablocki*, 434 U.S. 374 (marriage); *Stanley*, 405 U.S. 645 (parental rights); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Aptheker*, 378 U.S. 500 (right to travel); *Pierce*, 268 U.S.

---

[15] If it were, a statute authorizing the police to search *any* person, building or vehicle at *any* time, would be constitutional on its face because it could be constitutionally applied in some instances. Moreover, when dismissing a facial challenge, a court would be forced to identify at least one constitutional application of the statute, in essence rendering an advisory opinion on which applications of the statute are constitutional. It is not the role of the federal judiciary to identify minute constitutional applications of a statute, like the Act, that imposes a blanket prohibition on conduct generally protected by the Constitution.

510 (child rearing and education); *Moore*, 431 U.S. 494 (family choices).

This Court has struck down statutes in facial challenges even when the laws could be applied constitutionally to the very parties bringing the challenge. In *Aptheker*, the Court struck down a federal law prohibiting any member of a Communist organization from applying for a passport on the ground that the Act infringed the fundamental right to travel and thereby violated due process. The Court struck down the law on its face despite the claim that it could be applied constitutionally to the appellants themselves, who were found to be top-ranking Communist party leaders. *See* 378 U.S. at 525 (Clark, J., dissenting).

Furthermore, restrictions that infringe a fundamental right have been struck down even when the restrictions did not, in fact, prevent the party challenging the provision from exercising such a right. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (durational residency requirement for voting unconstitutionally infringes right to travel even though it did not deter plaintiff from moving); *Shapiro v. Thompson*, 394 U.S. 618, 650 (1969) (durational residency requirement for receipt of welfare benefits unconstitutional even though, in operation, few welfare recipients, and none of the litigants, were actually deterred from travel) (Warren, C.J., dissenting).

In adjudicating facial challenges, the Court has used an overbreadth analysis, similar to that used in the First Amendment context, to strike down provisions that impermissibly restrict constitutionally protected activity along with activity that may permissibly be restricted:

> It is a familiar and basic principle . . . that "a governmental purpose to control or prevent

> activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Aptheker, 378 U.S. at 508 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). While recognizing that the right to travel was closely related to First Amendment guarantees, the Court in *Aptheker* made clear that a law infringing a fundamental right, such as the right to travel, would be subject to an overbreadth analysis as applied in First Amendment cases. *See id.* at 516 ("Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, and *Thornhill v. Alabama*, 310 U.S. 88.") Thus, overbreadth analysis has not been strictly limited to the First Amendment context. *See also* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 285 (1984) ("A rule that proscribes significantly more conduct than is justified by the permissible governmental end may not be applied to the litigant, even though the litigant's own conduct could be prohibited. This is not only in the first amendment area, but whenever significant means-ends congruence is required by the applicable substantive constitutional law.").[16]

---

[16] *Salerno* itself is in agreement with these cases. In *Salerno*, certain defendants challenged the provision of the Bail Reform Act of 1984 that allows for pre-trial detention based on a finding of future dangerousness. However, the defendants never "claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case." 481 U.S. at 745 n.3. In recognition of the general rules of standing, *Salerno* merely declined to invalidate the Act because it "might operate unconstitutionally under some conceivable set of circumstances" not applicable to the defendants in that case. *Id.* at 745.

Where a fundamental constitutional right is at stake, the statute must be narrowly tailored to serve legitimate state interests. "[T]he question is whether the [provisions] sweep too broadly." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974); *see also Aptheker*, 378 U.S. at 514 (the section "sweeps too widely and too discriminately across the liberty guaranteed in the Fifth Amendment; *Dunn*, 405 U.S. at 343 ("In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives.") (citations omitted). This analysis applies with full force to statutes restricting abortion. *Roe*, 410 U.S. at 155.

Moreover, where the critical analytic question concerns the *purpose* of a statute,[17] facial challenges must be permitted. "A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face . . . ." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). It is clear that the purpose of the Louisiana legislature in enacting this statute was to prohibit *all* abortions, except in a very few limited exceptions, and petitioners cannot now assert a purpose to restrict only post-viability abortions. Where the purpose of a statute is contested as unconstitutional, parties must be given the opportunity to challenge the law before it is put into effect,

---

[17] In *Casey*, the Court made clear that the "undue burden" standard requires courts to inquire into the purpose of abortion laws: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820 (joint opinion) (emphasis added).

for the relevant determination does not depend upon the effects of the law, as applied, in operation.[18]

In striking down statutes as facially invalid, the Court has repeatedly rejected Petitioners' proposed rule that a law cannot be invalidated on its face, outside the First Amendment context, unless it can be shown that the law has no constitutional applications. Often, the Court has done so over a dissent that relied on the rule proposed by petitioners. *See, e.g.*, *Zablocki*, 434 U.S. at 409 (Rehnquist, J., dissenting); *Aptheker*, 378 U.S. at 521

---

[18] Moreover, the Louisiana ban cannot be upheld against a facial challenge based on the claim that the ban can be read to apply constitutionally to post-viability abortions, to abortions performed for sex selection or to "harvest" fetal parts, or to abortions performed by non-physicians. The plain language of the Act clearly prohibits all abortions with only a few limited exceptions. This Court cannot, in an effort to find the law constitutional, rewrite it to apply only to certain abortions. While "a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975) ("we are without power to remedy the defects by giving the ordinance constitutionally precise content"); *Scales v. United States*, 367 U.S. 203, 211 (1961) ("Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . ."). Nor can this Court sever the ban to uphold it as applied to those abortions which could constitutionally be prohibited and ignore it as to those abortions, which cannot be banned under *Casey* and *Roe*. "We are not able to reject a part [of the statute] which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional . . . from that which is not." *United States v. Reese*, 92 U.S. 214, 221 (1876).

(Clark, J., dissenting). However, the majority of the Court has declined to adopt this restrictive formulation.

Just last term in *Kraft*, 112 S.Ct. 2365, the Court invalidated a state income tax law that allowed a deduction for dividends received from domestic subsidiaries but not for dividends received from foreign subsidiaries, holding that the statute facially discriminated against foreign commerce in violation of the Foreign Commerce Clause. The Court struck down the statute despite the fact that it would not discriminate against foreign commerce in all applications. In his dissent, Chief Justice Rehnquist, joined by Justice Blackmun, relied on *Salerno* to argue that the statute should not be struck down on its face because it could be applied constitutionally in some cases: for example, the tax scheme would have no effect on foreign commerce when applied to a foreign subsidiary that is incorporated in a foreign country but engages in no foreign activity. 112 S. Ct. at 2372 (Rehnquist, C.J., dissenting). Nevertheless, the majority invalidated the law on its face.

CONCLUSION

Casey and *Roe* clearly establish that bans on abortion are unconstitutional on their face. Acceptance of Petitioners' request that this Court bar facial challenges to all abortion restrictions, including bans on abortion, would eviscerate the holdings of those cases and subject women to arbitrary and dangerous state laws. Further, a reversal of this Court's holdings in *Casey* would threaten the legitimacy of the Court and allow Louisiana and other states to return the dark ages. Therefore, the petitions for writs of certiorari must be denied.

Respectfully submitted,

WILLIAM E. RITTENBERG
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
ELLEN K. GOETZ
LENORA M. LAPIDUS
The Center for Reproductive Law & Policy
120 Wall Street
New York, NY 10005
(212) 514-5534

Attorneys for Respondents

February 4, 1993

APPENDIX

Statement of Governor Buddy Roemer
Regarding House Bill No. 112

House Bill 112 criminalizes abortions, imposes a minimum mandatory penalty of one year at hard labor and imposes a minimum a mandatory fine of $10,000 on any person convicted of performing an abortion. The maximum penalty is 10 years at hard labor and a $100,000 fine. Self-abortion is allowed but professional, medical abortions are not. The bill purports to grant exceptions for the life of the mother, for rape and for incest.

First, I applaud the legislature in its efforts to restrict abortions. The open window for abortions must be closed in order to protect the life of the unborn, but meaningful exceptions must be drawn in order to protect the life and rights of the woman involved.

As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Just as I said a year ago, the bill fails to provide for adequate protection for rape victims. The 5 day requirement for a medical examination and the 7 day

requirement for reporting to law enforcement are unworkable and unrealistic in many cases. The lives and rights of women in Louisiana demand balanced and thoughtful consideration. Forcing a rape victim to report to law enforcement officials and seek medical treatment, all within a week of the crime, is an onerous burden. Under this bill, ignorance of the law would force a woman to bear and give birth it a child conceived in brutality if she is unable to meet this artificial and narrow 7 day test. Is this a meaningful exception? I think not.

While prompt reporting may be ideal, it ignores reality: rape is the most underreported violent crime in our nation, with less than 20% of all rapes ever being reported to law enforcement. Much of this refusal to report stems from fear, humiliation and a reluctance to go through a public trial. The requirement that a woman have only 7 days to decide about reporting to law enforcement is a harsh burden.

While a woman, ideally, should go to her doctor as quickly as possible after a rape, many do not. The reporting periods I have requested (30 days for the medical examination and 45 days for law enforcement) are not arbitrary, but rather are based on simply human biology--within 30 days of intercourse a woman's body begins to change if she is pregnant. At that point a woman is likely to seek medical help on her own.

[2] The proponents of this bill also maintain that any expansion of the reporting period will "open the door" for women to lie and doctors to conspire with women to obtain abortions. They ignore the fact that rape is a terrible, pervasive reality in this country with the Los Angeles Commission on Assaults Against Women reporting that approximately 1 in 3 women in America will be raped.

More importantly, they ignore the basic dignity and trustworthiness of women as well as the honor and professional ethics of the doctors with whom these women consult. Women need more time to make a real, meaningful choice in a traumatic atmosphere.

The second amendment which I submitted would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device. I offered this amendment at the request of many obstetricians and gynecologists in this state. As the bill stands now, its definitions and terminology are so vague that doctors will be unwilling to risk their liberty and their professional careers by terminating any form of pregnancy at all.

Finally, I offered a carefully drawn amendment which would permit abortions in cases where the fetus is profoundly deformed, and the deformity is incompatible with life itself. The practice of medicine has advanced to such a degree that such deformities can, and generally are, detected early in the pregnancy. The decision on whether to carry such a fetus to full term should be up to the woman and her family--not the legislature.

House Bill 112 dishonors women, shows great mistrust of doctors and their professional judgment, and unduly burdens the traumatized victims of rape.

For these reasons I will veto House bill 112.